Samundee Devan a/l Kerishnan Muthu v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–39 OF 2005 AND B-05–40 OF 2005
LOW HOP BING, HELILIAH AND ABDUL MALIK ISHAK JJCA
25 JULY 2008

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Prosecution proving mens rea possession without resorting to presumption of possession at close of prosecution — Whether court entitled to apply presumption of trafficking at close of prosecution — Accused's defence of denial failing to rebut presumption of trafficking — Whether court ought to convict accused of trafficking in dangerous drugs

Criminal Procedure — Charge — Amendment — Trial judge finding prima facie case of drug trafficking established on two counts at close of prosecution — Trial judge reaching such decision due substantially to chemist's evidence — Accused merely raising denial as defence — Trial judge amending both counts of drug trafficking to a lesser and single count of possession at end of trial — Trial judge so deciding due to dissatisfaction with chemist's evidence — Whether amendment proper — Whether trial judge had misdirected himself

Evidence — Circumstantial evidence — Inferences from facts — Whether sufficient facts to support inference that accused had possession and knowledge of dangerous drugs

Evidence — Expert evidence — Analysis of dangerous drugs — Whether trial judge's view that chemist had taken insufficient samples for drug analysis valid ground for rejecting expert evidence of chemist — Whether trial judge ought to have applied decision in Gunalan a/l Ramachandran & Ors v Public Prosecutor

Evidence — Expert evidence — Chemist's evidence — Trial judge refusing to wholly accept evidence of chemist testifying for prosecution — Evidence of chemist not challenged by accused — Trial judge relying on chemist's evidence to call for defence — Whether trial judge had misdirected himself by questioning evidence of chemist

Evidence — Expert evidence — Evidentiary value — Whether expert evidence carried a high probative value — Role of expert — Reasons for expert evidence

Acting on information received concerning a stolen vehicle, police officers carried out surveillance on a blue Honda Civic motorcar ('the said car'). The police officers observed the accused walk to the said car, look around him, open the boot of the said car and then retrieve a red plastic package. The accused was apprehended as he was walking away with the red plastic package. It was in evidence that the accused looked shocked and attempted to run away when he saw the police officers rush towards him. From the accused police seized the red plastic package. The accused was asked to open the boot of the said car. He took out from his trouser pocket the car key and opened the boot with this key. From the boot, police recovered other red plastic packages. All these red plastic packages were found to contain pink, crystalline substances which the government chemist confirmed to be dangerous drugs. The accused was charged with two counts of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The government chemist testified for the prosecution and his evidence was not challenged on material particulars by the defence. At the close of the prosecution's case, the accused was called to enter his defence on both charges. His defence was a mere denial and he chose to give evidence from the dock. At the end of the trial, the High Court judge amended the charges. He reduced both charges to a single charge for the lesser offence of possession under s 12(2) of the Act and convicted the accused thereon. The trial judge amended the charges because he was not satisfied with the analysis carried out by the chemist. The accused was then sentenced to five years' imprisonment and nine strokes of the cane. The accused appealed to the Court of Appeal against both conviction and sentence. The prosecution cross-appealed against the decision of the trial judge amending the two charges of drug trafficking under s 39B(1)(a) of the Act to the single charge of possession under s 12(2) of the Act.

Held, setting aside the decision of the High Court and substituting therefore a conviction under s 39B(1)(a) of the Act on each charge, and sentencing the accused to death:

(1) Expert opinions carry a high probative value for the following reasons: (i) an expert has the necessary experience to arrive at and justify his opinion in his own field; and (ii) the expert's opinion can be tested against the known facts and the opinion of another expert called by the opposing party. In the instant case, the accused did not call his own expert to challenge the evidence of the government chemist (see para 19).

(2) Experts are called to express their opinions on matters in issue in a particular case. The court needs the benefit of expertise to arrive at a just decision. An expert's opinion is admissible to furnish the court with

scientific information which is likely to be outside the experience and knowledge of the judge (see para 20).

(3) The trial judge was not satisfied with the chemist's analysis since he felt the chemist had not taken a sufficient amount of samples for analysis. In this regard, the trial judge had erred in refusing to follow the decision of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 289, a decision of the Court of Appeal which the trial judge was bound to follow by virtue of the doctrine of stare decisis. Adherence to precedents by the lower courts ought to be the rule rather than the exception. The trial judge's decision to amend both the trafficking charges to a single possession charge, due to his failure to apply the decision in *Gunalan a/l Ramachandran & Ors v Public Prosecutor*, was thus flawed (see paras 26, 28 & 30).

(4) The trial judge ought to have accepted wholly the evidence of the government chemist. The judge had misdirected himself by questioning the evidence of the chemist since: (i) the accused failed to challenge and/or rebut the evidence of the chemist; and (ii) the defence was called on both charges on the evidence of the chemist (see para 29).

(5) At the close of the prosecution's case, the prosecution had succeeded in establishing several facts and circumstances. These facts and circumstances when taken separately appeared neutral but when taken together they gave rise to the inference that the accused was aware of the contents of the red plastic package that he was carrying in his right hand as well as the drugs that were found in the boot of the said car. The court was also entitled to take into account the damning conduct of the accused just before he was arrested. Since the defence was merely one of denial, the High Court judge having called for the defence on both charges of trafficking, should have convicted the accused on both the charges (see paras 41 & 48).

(6) In the instant case, all the known facts supported the inference that the drugs were under the control of the accused to the exclusion of other persons. The accused certainly had knowledge of those drugs. Here, the High Court judge did not make the mistake of resorting to a double presumption. The High Court judge correctly held that the accused was prima facie in possession of the drugs quite independently of s 37(d) of the Act (see paras 51–52).

(7) In the instant case, the evidence of conduct on the part of the accused in attempting to run away from the scene when PW7 identified himself as 'police' — even before the discovery of the drugs in the red plastic package and the drugs in the boot of the said car — clearly showed prior knowledge of the drugs. There was no other evidence for the court to make an inference other than the inference that the accused was

aware of the drugs in the red plastic package and had knowledge of the same. The fact that the accused was in possession of the car key to the said car, which evidence was unchallenged, established that the accused was in custody or control of the said car. This gave rise to the inference that the accused was in possession with knowledge of the drugs in the boot of the said car (see paras 55 & 58).

(8) The prosecution had succeeded in proving mens rea possession without relying on the presumption under s 37(d) of the Act. The High Court judge was thus right when he applied the presumption of trafficking at the prima facie stage under s 37(da)(iiia) of the Act. Since the defence was one of mere denial, the accused did not successfully rebut the presumption of trafficking on the balance of probabilities. The accused ought to have been convicted of trafficking in the dangerous drugs on both charges (see paras 62–63).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima berkaitan kenderaan yang telah dicuri, pegawai polis telah melakukan pengawasan ke atas kereta Honda Civic biru ('kereta tersebut'). Pegawai polis tersebut telah memerhati tertuduh berjalan menuju ke kereta tersebut, melihat sekelilingnya, membuka but kereta tersebut dan kemudian mengeluarkan bungkusan plastik merah. Tertuduh telah ditahan semasa dia berjalan dengan bungkusan plastik merah itu. Adalah dalam keterangan bahawa tertuduh terkejut dan cuba melarikan diri apabila dia lihat pegawai polis berkejar ke arahnya. Polis telah merampas bungkusan plastik merah itu daripada tertuduh. Tertuduh telah diminta membuka but kereta tersebut. Dia mengeluarkan kunci kereta daripada poket seluarnya dan membuka but dengan kunci tersebut. Polis telah menjumpai bungkusan plastik merah lain daripada but tersebut. Kesemua bungkusan plastik merah tersebut didapati mengandungi bahan habluran merah jambu yang disahkan oleh ahli kimia kerajaan sebagai dadah berbahaya. Tertuduh telah dituduh dengan dua pertuduhan mengedar dadah berbahaya di bawah s 39B((a) Akta Dadah Berbahaya 1952 ('Akta'). Ahli kimia kerajaan telah memberi keterangan bagi pihak pendakwaan dan keterangannya tidak dicabar atas butiran penting oleh pihak pembelaan. Di penutup kes pendakwaan, tertuduh telah dipanggil untuk memasukkan pembelaannya terhadap kedua-dua pertuduhan. Pembelaannya hanya merupakan penafian dan dia memilih untuk memberikan keterangan dari kandang orang salah. Di akhir perbicaraan hakim Mahkamah Tinggi telah meminda pertuduhan-pertuduhan tersebut. Beliau telah mengurangkan kedua-dua pertuduhan kepada satu pertuduhan untuk kesalahan pemilikan yang lebih ringan di bawah s 12(2) Akta dan mensabitkan tertuduh dengannya. Hakim perbicaraan telah meminda pertuduhan-pertuduhan tersebut kerana beliau tidak berpuas hati dengan analisis yang dilakukan oleh ahli kimia tersebut.

A Tertuduh kemudian telah dijatuhkan hukuman lima tahun penjara dan sembilan sebatan rotan. Tertuduh telah merayu ke Mahkamah Rayuan terhadap kedua-dua sabitan dan hukuman. Pihak pendakwaan telah membuat rayuan balas terhadap keputusan hakim perbicaraan yang meminda dua pertuduhan pengedaran dadah di bawah s 39B(1)(a) Akta kepada satu
B pertuduhan milikan di bawah s 12(2) Akta.

C **Diputuskan**, mengetepikan keputusan Mahkamah Tinggi dan menggantikan dengan sabitan di bawah s 39B(1)(a) Akta untuk setiap pertuduhan, dan menjatuhkan hukuman mati ke atas tertuduh:

(1) Pendapat pakar mempunyai nilai probatif tinggi kerana sebab-sebab berikut: (i) seorang pakar mempunyai pengalaman yang perlu untuk
D tiba kepada dan menjustifikasikan pendapatnya dalam bidangnya sendiri; dan (ii) pendapat pakar boleh diuji dengan fakta yang diketahui dan pendapat pakar lain yang dipanggil oleh pihak yang menentang. Dalam kes ini, tertuduh tidak memanggil pakarnya sendiri untuk mencabar keterangan ahli kimia kerajaan (lihat perenggan 19).
E

(2) Para pakar dipanggil untuk menyatakan pendapat mereka berhubung perkara-perkara yang menjadi isu dalam kes tertentu. Mahkamah memerlukan manfaat pakar untuk tiba kepada keputusan yang adil. Pendapat pakar boleh diterima untuk memberi mahkamah maklumat
F saintifik yang mungkin di luar pengalaman dan pengetahuan hakim (lihat perenggan 20).

(3) Hakim perbicaraan tidak berpuas hati dengan analisis ahli kimia memandangkan beliau merasakan ahli kimia itu tidak mengambil
G jumlah sampel yang mencukupi untuk analisis. Dalam hal ini, hakim perbicaraan telah terkhilaf kerana enggan mengikut keputusan kes *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 289, iaitu keputusan Mahkamah Rayuan di mana hakim perbicaraan adalah terikat untuk mengikut doktrin stare decisis. Pematuhan kepada
H duluan oleh mahkamah bawahan patut dijadikan peraturan dan bukan pengecualian. Keputusan hakim perbicaraan untuk meminda kedua-dua pertuduhan pengedaran kepada satu pertuduhan milikan, akibat kegagalannya menggunapakai keputusan dalam kes *Gunalan a/l Ramachandran & Ors v Public Prosecutor*, adalah cacat (lihat perenggan
I 26, 28 & 30).

(4) Hakim perbicaraan patut menerima keseluruhan keterangan ahli kimia kerajaan. Hakim telah salah arah dengan menyoal keterangan ahli kimia memandangkan: (i) tertuduh telah gagal mencabar dan/atau

mematahkan keterangan ahli kimia; dan (ii) pembelaan telah dipanggil untuk kedua-dua pertuduhan atas keterangan ahli kimia (lihat perenggan 29).

(5) Di penutup kes pendakwaan, pihak pendakwaan telah berjaya membuktikan beberapa fakta dan keadaan. Fakta dan keadaan tersebut apabila diambil secara berasingan kelihatan neutral tetapi apabila diambil bersama menimbulkan inferens bahawa tertuduh sedar tentang kandungan bungkusan plastik merah yang dibawanya di tangan kanannya dan juga dadah yang ditemui dalam but kereta tersebut. Mahkamah juga berhak mengambilkira perlakuan terkutuk tertuduh sejurus sebelum dia ditangkap. Memandangkan pembelaan tersebut hanya penafian semata-mata, hakim Mahkamah Tinggi yang telah memanggil pembelaan untuk kedua-dua pertuduhan pengedaran, patut mensabitkan tertuduh atas kedua-dua pertuduhan tersebut (lihat perenggan 41 & 48).

(6) Dalam kes ini, kesemua fakta yang diketahui menyokong inferens bahawa dadah tersebut di bawah kawalan tertuduh dengan pengecualian orang lain. Tertuduh sememangnya mempunyai pengetahuan tentang dadah tersebut. Di sini, hakim Mahkamah Tinggi tidak membuat apa-apa kesilapan menggunakan andaian berganda. Hakim Mahkamah Tinggi dengan betul telah memutuskan bahawa tertuduh secara prima facie memiliki dadah tersebut dengan sendirinya s 37(d) Akta (lihat perenggan 51–52).

(7) Dalam kes ini, keterangan tentang perlakuan di pihak tertuduh yang cuba melarikan diri dari tempat kejadian apabila PW7 memperkenalkan dirinya sebagai 'polis' — walaupun sebelum penemuan dadah dalam bungkusan plastik merah dan dadah dalam but kereta tersebut — jelas menunjukkan terdapat pengetahuan terdahulu tentang dadah tersebut. Tiada keterangan lain untuk mahkamah membuat inferens selain daripada inferens bahawa tertuduh sedar tentang dadah dalam bungkusan plastik merah tersebut dan mempunyai pengetahuan yang sama. Fakta bahawa tertuduh memiliki kunci kereta kepada kereta tersebut, yang mana keterangan tidak dicabar, membuktikan bahawa tertuduh mempunyai jagaan atau kawalan kereta tersebut. Ini menimbulkan inferens bahawa tertuduh mempunyai milikan dengan pengetahuan tentang dadah dalam but kereta tersebut (lihat perenggan 55 & 58).

(8) Pihak pendakwaan telah berjaya membuktikan milikan mens rea tanpa bergantung kepada andaian di bawah s 37(d) Akta. Hakim Mahkamah Tinggi oleh itu adalah betul apabila beliau menggunakan andaian pengedaran di peringkat prima facie di bawah s 37(da)(iiia) Akta. Memandangkan pembelaan hanya semata-mata penafian, tertuduh tidak berjaya mematahkan andaian pengedaran atas imbangan

kebarangkalian. Tertuduh patut disabitkan kerana mengedar dadah berbahaya untuk kedua-dua pertuduhan (lihat perenggan 62–63).]

Notes

For a case on analysis of dangerous drugs, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1404.

For cases on amendment of charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1060–1065.

For cases on chemist's evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1418–1423.

For cases on evidentiary value of expert evidence generally, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1403–1515.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Basil bin Omar v PP [2003] 1 MLJ 192, CA (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201, FC (refd)
Davie v Magistrates of Edinburgh [1953] SC 34 (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Folkes, Bart v Chadd & Ors [1782] 3 Douglas, King's Bench (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11, SC (refd)
Leow Nghee Lim v Reg [1956] MLJ 28, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210, FC (refd)
Pichi Muthu, Re [1970] 2 MLJ 143, HC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Ang Soon Huat [1999] 1 MLJ 1, HC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158, HC (refd)
Surentheran a/l Selvaraja v PP [2006] 1 MLJ 641; [2005] 2 CLJ 264, CA (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132, FC (refd)
Tan Ah Tee & Anor v PP [1980] 1 MLJ 49, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da), 37(da)(iiia), 37(j), 39A(1)(d), 39B(1)(a), 39B(2)

Karpal Singh (Karpal Singh & Co) for the accused.

Nurulhuda Nur'aini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

THE CHARGES

[1] The appellant ('the accused') faced two drug charges in the High Court of Shah Alam under the Dangerous Drugs Act 1952 (Act 234) ('the Act') and those two drug charges are as follows:

First charge

For trafficking in dangerous drugs under s 39B(1)(a) of the Act, to wit, 33.2g of heroin and monoacetylmorphines (5.8g of heroin and 27.4g of monoacetylmorphines) on 2 April 1999 at about 10.15am at the car park of Flat 'C', Taman Petaling Utama, Jalan Klang Lama, in the district of Petaling Jaya, in the State of Selangor Darul Ehsan ('car park of Flat 'C") and punishable under s 39B(2) of the Act.

Second charge

For trafficking in dangerous drugs under s 39B(1)(a) of the Act, to wit, 514.1g of heroin and monoacetylmorphines (73.6g of heroin and 440.5g of monoacetylmorphines) on 2 April 1999 at about 10.15am at the car park of Flat 'C', Taman Petaling Utama, Jalan Klang Lama, in the district of Petaling Jaya, in the State of Selangor Darul Ehsan ('car park of Flat 'C") and punishable under s 39B(2) of the Act.

THE OUTCOME OF THE TRIAL AT THE HIGH COURT

[2] At the close of the case for the prosecution, the High Court judge called upon the accused to enter his defence on both the original charges. The accused elected to give his evidence at the dock. The accused also called two other witnesses — his mother (DW1) and his sister (DW2).

[3] And at the end of the case for the defence, the High Court judge convicted the accused not on the original two charges but rather on only one charge, which was a reduced charge, for possession of 4.875g of heroin and monoacetylmorphines under s 12(2) of the Act and punishable under

s 39A(1)(d) of the Act. The High Court judge then sentenced the accused to five years imprisonment with effect from the date of conviction (29 March 2005) and nine strokes of whipping.

[4] Aggrieved by the decision of the High Court judge, the accused filed an appeal, to this court, against the conviction and sentence. Essentially, the appeal of the accused was against the whole decision of the High Court judge vide Criminal Appeal No B-05–39 of 2005.

[5] The public prosecutor also filed a counter appeal against the decision of the High Court judge *for amending both the original charges from trafficking* under s 39B(1)(a) of the Act and punishable under s 39B(2) of the Act *to a single charge of possession* under s 12(2) of the Act and punishable under s 39A(1)(d) of the Act at the end of the case for the defence and passed sentence accordingly as alluded to earlier. Just like the accused, the public prosecutor also filed the appeal against the whole decision of the High Court judge vide Criminal Appeal No B-05–40 of 2005.

THE FACTS OF THE CASE

[6] On 2 April 1999 at 7.40am, L/Kpl 71653 Chandran a/l V Subramaniam (PW7) of the Criminal Intelligence Unit, Police Headquarters, Petaling Jaya together with L/Kpl Appasamy proceeded by motorcar to the car park of Flat 'C'. They had gone there based purely on information received regarding the theft of a stolen vehicle.

[7] Upon arrival, PW7 saw a blue Honda Civic motor bearing registration No WFV 2724 parked at the car park of Flat 'C'. That must have been the stolen vehicle, the subject matter of the information. PW7, who arrived in a motorcar with L/Kpl Appasamy, proceeded to park his motorcar at a comfortable distance away and there they dutifully observed the blue Honda Civic. According to PW7, at that time, there was no one in the blue Honda Civic. From where they were located, they had an unobstructed view of the blue Honda Civic.

[8] The prosecution led evidence to show that No WFV 2724 that was on the blue Honda Civic was in fact a false number plate. I shall allude to this later.

[9] Both PW7 and L/Kpl Appasamy kept vigil and focussed their entire attention on the blue Honda Civic. One hour and forty minutes later their vigil paid off. They saw the accused walking alone towards the blue Honda Civic. And at point marked 'X' in photograph 'B' of p 608 in appeal record Part 2 ('AR–P2'), they saw the accused stopped and he was seen *looking to the*

left, to the right and to the front and at the same time turning his head to the left and to the right ('the first conduct'). In its original text, the notes of evidence at p 67 of the appeal recort Part 1 ('AR–P1') carried the evidence of PW7 in examination-in-chief to this effect:

> Dia (referring to the accused) terus memandang kiri, kanan dan hadapan beliau (referring to the accused), sambil memusing kepalanya (referring to the accused) ke kiri dan ke kanan.

[10] PW7 then saw the accused opening the car boot of the blue Honda Civic and took out a red plastic package and then closed the boot. The accused was seen holding onto the red plastic package with his right hand and was seen walking away from the blue Honda Civic. On seeing this, PW7 and L/Kpl Appasamy quickly got out of their car and rushed towards the accused and PW7 introduced himself as the *police*. The accused looked shocked and attempted to run away ('the second conduct') but was apprehended. At the time of his arrest the accused was still holding onto the red plastic package in his right hand. The testimony of PW7 as to what had happened can be seen in his examination-in-chief at p 50 of 'AR–P1. In its original text, this was what PW7 had testified:

> Pada masa yang sama, saya bersama L/Kpl Appasamy terus menyerbu dan saya kenalkan diri sebagai polis, di mana lelaki itu terkejut cuba melarikan diri. Dengan pantas dan bantuan L/Kpl Appasamy, kami dapat tangkap lelaki itu. Pada masa ini, lelaki itu masih memegang bungkusan plastik merah di tangan kanan.

[11] Again, in examination-in-chief, PW7 elaborated in greater detail the conduct of the accused when PW7 and L/Kpl Appasamy rushed at the accused who was at that time walking away from the blue Honda Civic and holding the red plastic package in his right hand. The vivid testimony of PW7 indicated that the accused realised that someone was rushing towards him because of the *squeaky noises* made by the shoes worn by PW7 and L/Kpl Appasamy. Because of that *squeaky noises*, the accused saw PW7 and the accused looked surprised and his face turned pale ('the third conduct'). At that time the distance between PW7 and the accused was only about two steps away. PW7 continued with his testimony and said that after he shouted *police*, the accused attempted to run away and it was then that the accused was arrested. I will now let PW7 narrate the episode in his own words as seen at pp 67–68 of 'AR–P1':

> Semasa saya menghampiri Tertuduh, Tertuduh perasan akan kedatangan saya.
>
> Q: Kenapa awak kata dia perasan?
>
> A: Sebab semasa itu saya bersama L/Kpl Appasamy. Semasa kami rush kasut kami berbunyi. Bunyi kasut kami buat dia perasan.

Q: Mengapa kamu kata dia perasan?

A: Kerana dia pandang saya, dan semasa dia pandang saya dia kelihatan terkejut. Semasa saya menghampiri dia, dia menoleh ke belakang dan apabila melihat saya, muka dia macam pucat terkejut.

Q: Ketika dia menoleh ke belakang, jarak kamu dengan dia berapa jauh?

A: Lebih kurang 2 langkah.

Q: Apabila dia menoleh ke belakang, apa kamu buat seterusnya?

A: Oleh kerana dia ternampak kami, saya terus menyahut 'Polis!' Pada masa yang sama saya nampak dia cuba melarikan diri. Dengan bantuan Appasamy saya dapat tangkap dia di tempat yang sama.

[12] PW7 seized the red plastic package from the accused's right hand and upon opening the package, in the presence of the accused, found another package wrapped in a newspaper. Inside this newspaper wrapping were four (4) plastic packages tied with a rubber band each containing 140 small plastic packets with pinkish crystallite and powdery substances which was later analysed by the government chemist and confirmed to be heroin and monoacetylmorphines as per the first charge.

[13] After examining the contents of the red plastic package, PW7 held onto that red plastic package while the accused led the way to the blue Honda Civic. The accused was asked to open the boot of the blue Honda Civic and the accused then took out from his right trouser pocket the car keys. Using the key, the accused then opened the boot of the blue Honda Civic. Inside the boot of the blue Honda Civic, at the right hand side were a few empty bags and a purple bag, which upon opening, contained two red plastic bags which in turn contained a pink powdery and crystallite substances. PW7 also saw two more red plastic packages in the boot, which when opened, contained substances of similar appearance. All these were later analysed by the government chemist who confirmed that they were heroin and monoacetylmorphines as per the second charge.

[14] Investigations by the investigating officer by the name of ASP Hashim bin Abdullah (PW8) showed that based on the engine and chassis numbers, the blue Honda Civic carried the registration No WFB 7041 and it was registered in the name of Sazlina bt Khalid (PW5). That being the case, PW8 said that the number plate WFV 2724 was a false number plate. According to PW5, she had purchased the blue Honda Civic from Bank Simpanan Nasional by way of a hire purchase. And in January 1997, PW5 sold the blue Honda Civic to Mustafa bin Abd Rahman. According to PW5, Mustafa bin Abd Rahman was supposed to make the necessary arrangement for the transfer of the ownership of the blue Honda Civic from PW5 to him. With

this understanding, PW5 after signing the necessary forms, delivered possession of the blue Honda Civic to him. Again, according to PW5, a few months after selling the blue Honda Civic her father who was the guarantor in the hire purchase received a notice of demand for the outstanding payment of the blue Honda Civic. It was at that point of time that PW5 realised that her name still appeared on the registration card of the blue Honda Civic as the owner. PW5 then tried in vain to search for Mustafa bin Abd Rahman and this prompted her to lodge a police report.

[15] It was in evidence that both PW7 and L/Kpl Appasamy proceeded to the car park of Flat 'C' on information pertaining to the theft of a stolen vehicle. They proceeded there not on account of information pertaining to drugs. This was what PW7 said under examination-in-chief as seen at pp 68–69 of 'AR-P1':

> Q: Pada asalnya kamu ke tempat kejadian untuk tujuan apa?
>
> A: Pada pagi itu saya pergi ke tempat kejadian atas maklumat kereta curi.
>
> Q: Selain dari itu, ada maklumat lain seperti maklumat tentang dadah?
>
> A: Tidak ada.

Why did the High Court judge convict the accused, at the end of the case for the defence, on only one charge of possession of 4.875g of heroin and monoacetylmorphines under s 12(2) of the Act and punishable under s 39A(1)(d) of the Act?

[16] The reason, as advanced by the High Court judge, was this. That he was not fully satisfied with the analysis carried out by the government chemist that was based on the small quantities of samples for the purpose of quantitative test. In his own words, this was what the High Court judge said (see p 579 of 'AR–P2'):

> Why did I find him guilty of the lesser offence of possession of heroin and monoacetylmorphines under s 12(2) of the DDA instead of the original charges of trafficking? Why did I reduce the amount of the drugs which I considered to be the subject matter of the offence under s 12(2), to that of 4.875g of heroin and monoacetylmorphines combined? I did so because I was not fully satisfied with the analysis as carried out by the government chemist, PW6, who had taken very small quantities — indeed, extremely small quantities — of samples for the purpose of the quantitative test.

[17] It seems clear that in amending the original two charges for trafficking to only one charge for possession, at the end of the case for the defence, there was only one reason that motivated the High Court judge to do so. And that was because the High Court judge was dissatisfied with the small weight of the samples used by the government chemist.

[18] In his written judgment at pp 587–588 of 'AR-P2', the High Court judge relied on the case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11, a decision of the Supreme Court, as a basis for his conclusion. The High Court judge also alluded to the fact that the Supreme Court in *Leong Bon Huat* had cited with approval the Singapore's case of *Public Prosecutor v Ang Soon Huat* [1999] 1 MLJ 1. While acknowledging the role of the government chemist as an expert witness, the High Court judge merely paid lip service to the importance of the evidence of the government chemist without giving due weight and effect to it. This was what the High Court judge said at pp 592–593 of 'AR-P2':

> I do of course accept that a court of law must give due weight to the evidence of an expert witness such as a chemist especially when the evidence is not disputed by another expert. Indeed, by the words 'the particular circumstances of each case' the Supreme Court must have meant that the opinion of the chemist must also, besides other factors, be seriously considered before a decision is made. But it is trite law that the chemist (or any expert for that matter) does not to (sic) have the final say. It is the judge who makes the final determination. True, the judge is not an expert in this field. But he is not all that helpless. He has his general knowledge to rely on. He has his experience in hearing many drug trafficking cases. He is familiar with all the various tests normally carried out by the chemist when analysing a given substance to detect the presence of drugs, and if present to determine the nature and the weight of the same. He has his common sense, and his sense of justice and fairness, to guide him. An opinion of an expert is just an opinion. It is not conclusive. I must stress here that in the present case I am not rejecting outright the opinion of the chemist. I respect and accept the opinion of the chemist as to the nature of the drugs, that is to say, the substance contained heroin and monoacetylmorphines; but my only reservation is that I had some doubts as to accuracy of his analysis regarding the quantity of the drugs.

[19] The value of expert opinions can never be doubted. Expert opinions have a high probative value. Two reasons may be advanced for this. Firstly, an expert witness has the necessary experience in arriving at and justifying his opinion in his specialist field. Secondly, expert opinions can readily be tested against the known facts and the opinion of another expert called by the opposing party in the case. *Here, the accused did not call another expert to challenge the evidence of the government chemist.* As to the duty of an expert witness, I need only to refer to the case of *Davie v Magistrates of Edinburgh* [1953] SC 34 at p 40. There the court had this to say:

> Their duty to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

[20] Experts are called in the majority of cases primarily in order to express their opinion as to the matters in issue in the case. *Here, the government chemist was called to analyse whether the subject matter of both the original charges are heroin and monoacetylmorphines, a dangerous drug under the Act*. The court needs the benefit of expertise to arrive at a just decision. Lord Mansfield said in *Folkes, Bart v Chadd & Ors* [1782] 3 Douglas, King's Bench, para 157, at p 589 that the opinion of scientific men upon proven facts may be given by men of science within their own science. I venture to say that an expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge.

[21] At p 597 of 'AR–P2', the High Court judge made a final analysis in regard to the value of the evidence of the government chemist. This was what he said:

> All that I am saying is that, considering the amount of samples taken for analysis, which I thought was too little under the circumstances, I was not satisfied that the chemist had given a beyond reasonable doubt evidence as to the actual weight of the heroin and monoacetylmorphines found in the substance.

[22] The prosecution brought to the attention of the High Court judge to the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, a decision of this court with a coram of Denis Ong, Abdul Hamid Mohamad and Abdul Aziz Mohamad JJCA. There Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia) writing for the majority made reference to the case of *Leong Bon Huat* and His Lordship aptly said at pp 515–516 of the report to the following effect:

> Indeed, I do not think that that case laid down any general principle. The decision was confined to the circumstances of the case and, as stressed by the court, what would be an adequate quantity would depend on the particular circumstances of each case. Even then, the question is: In the absence of a specific provision of the law, who is to determine what is the adequate quantity that should be taken as sample(s) for the purpose of carrying out the tests? The court or the chemist? Who is the expert? Who carries out the test? The answer must be the chemist.

[23] His Lordship Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia), after discussing a few authorities, had this to say in *Gunalan* (see p 517 of the report):

> In the circumstances, with greatest respect, I am unable to follow *Leong Bon Huat v Public Prosecutor and Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664. Instead I prefer to follow *Au Ah Lin v Public Prosecutor* [1963] MLJ 365 and *Public Prosecutor v Lam Sam* [1991] 3 MLJ 426.

[24] Interestingly, the Federal Court in *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201 accepted the views of Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia) and the dissenting judgment of Abdul Aziz Mohamad JCA (later FCJ) in *Gunalan*'s case. Nik Hashim FCJ (delivering the judgment of the Federal Court in *Chu Tak Fai*) had this to say at pp 214–215 of the report:

> With regard to the chemist's evidence in *Leong Bon Huat*, Abdul Hamid Mohamad JCA (as he then was) said in *Gunalan a/l Ramachandran*, at p 516:
>
> > With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v Lam San.* With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v Lam San*, the 10% is nothing more that the practice among chemists.
>
> The above view was shared by Abdul Aziz Mohamad JCA (as he then was) in a separate judgment in the same case at p 527 when he said:
>
> > No law or statute has laid down the process which a chemist is bound to use in order to prove the nature of a substance as being or as containing a particular dangerous drug or the weight of the dangerous drug in a bulk of the substance. The process belongs to the realm of science and is devised according to the discipline and principles of science.
>
> It is to be noted that the above observations of the learned judges have since received approval *sub silentio* from the Federal Court (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197). With respect, we agree with the views of both the learned judges. It is clear therefore that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary.

[25] Further down at p 215 of the report in the case of *Chu Tak Fai*, Nik Hashim FCJ aptly said:

> Therefore, with profound respect, Loo Kia Meng, insofar as it holds that a minimum of 10% of the drug must be taken for analysis and *Leong Bon Huat*, insofar as it holds that the chemical tests must be carried out on adequate quantities (samples) of the drug, are decisions with which we are unable to agree and they should not be followed.

[26] It was rather unfortunate that the High Court judge refused to be bound by *Gunalan*'s case. By virtue of the doctrine of stare decisis, the decision of a higher court acts as a binding authority on a lower court. Glanville Williams, *Learning the Law* (10th Ed, 1978) at p 62 describes the doctrine of stare decisis in this way:

> What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur; but the legally material facts may recur and it is with these that the doctrine is concerned.

[27] There must be certainty in the law. All the legal practitioners and litigants expect this. It is also desirable to have stability in the law. The notions of justice and fairness would support the doctrine of stare decisis. On the same set of facts, litigants expect to be treated alike. Benjamin N Cardozo in his treatise entitled: *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1921) at pp 9–50, cited the following passage from WG Miller, *The Data of Jurisprudence*, at p 335:

> If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.

[28] Litigants must have faith in our administration of justice. To do this, adherence to precedents by the lower courts must be the rule rather than the exception. With respect, the High Court judge should have accepted wholly the evidence of the government chemist.

[29] It is our judgment that the High Court judge had misdirected himself by not accepting wholly the evidence of the government chemist when he questioned the quantitative test undertaken by the government chemist bearing in mind that:

(a) the accused did not call another expert witness to rebut and challenge the evidence of the government chemist; and

(b) the defence of the accused was called at the close of the prosecution's case based, inter alia, on the evidence of the government chemist for both the charges of trafficking in the dangerous drugs.

[30] It is also our judgment that the decision of the High Court judge to amend both the charges from trafficking in the dangerous drugs to one single

charge of possession of the dangerous drugs, at the end of the case for the defence, was flawed because the High Court judge failed to vigorously apply the decision of this court in *Gunalan* in the context of the reception of the evidence of the government chemist. The doctrine of stare decisis was not adhered to by the High Court judge.

THE PETITION OF APPEAL OF THE ACCUSED

[31] Only one ground of appeal was relied upon by learned counsel for the accused. It was ground (7) and, in its original text, it was worded as follows:

> Yang Arif Hakim Perbicaraan Bijaksana khilaf dalam undang-undang apabila memutuskan bahawa section 37(da)(iiia) Akta Dadah Berbahaya 1952 terpakai terhadap tertuduh di peringkat kes prima facie.

[32] Was the High Court judge wrong in law when he held that s 37(da)(iiia) of the Act applied to the accused at the prima facie stage? Now, s 37(da)(iiia) of the Act enacts as follows:

> Presumptions
>
> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (da) any person who is found in possession of —
>
> (iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

ANALYSIS

[33] The High Court judge made specific finding of facts in his written judgment as seen at p 576 of 'AR–P2' and this was what he said:

> At the close of the case for the prosecution, I found a prima facie case had been made out by the prosecution in respect of the two charges. I was satisfied on the evidence that the accused was prima facie in possession of the five packages. And, accordingly, I had invoked the presumption under s 37(da)(iiia) of the DDA.

[34] The specific finding of facts by the High Court judge may be divided into three parts. Firstly, at the close of the case for the prosecution, the High

Court judge found that a prima facie case had been made out by the prosecution in respect of the original two charges. Secondly, the High Court judge was satisfied on the evidence that the accused was prima facie in possession of the five packages. Thirdly, the High Court judge had invoked the presumption under s 37(da)(iiia) of the Act and, consequently, the accused shall be presumed, until the contrary is proved, to be trafficking in the dangerous drugs.

[35] Learned counsel for the accused argued along the following lines:

(1) that the High Court judge erred in invoking the presumption of trafficking under s 37(da)(iiia) of the Act; and

(2) that the drugs found in the boot of the blue Honda Civic did not ipso facto fall within the words *anything whatsoever containing any dangerous drug* and that being the case, the presumption under s 37(d) of the Act did not arise (*Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; and *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132).

[36] In his submission, learned defence counsel for the accused conceded that there was possession of the red plastic package inclusive of its contents by the accused. He too conceded, in so far as the red plastic package inclusive of its contents were concerned, that the presumption of possession under s 37(d) of the Act could be invoked. But he strenuously argued that there was no offence of trafficking in so far as the red plastic package inclusive of its contents were concerned.

[37] For ease of reference, s 37(d) of the Act is now reproduced. It enacts as follows:

> Presumptions
>
> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[38] We were urged to consider carefully the approach adopted by the High Court judge. It was argued that the High Court judge failed to appreciate the niceties of the evidence of PW7. It was pointed out that the fact that the accused attempted to run away before being arrested was not considered at all by the High Court judge. No doubt that the car keys to the blue Honda Civic were held by the accused but it was argued that the High Court judge did not

appreciate the evidence in its correct perspective and that the High Court judge merely said that he was satisfied ... *that the accused was prima facie in possession of the five packages.*

[39] It must be recalled that when PW7 gave evidence, there was no cross-examination challenging that the accused was walking away from the blue Honda Civic holding in his right hand the red plastic package inclusive of its contents which formed the basis of the first original charge of trafficking. It was also not challenged that the accused was arrested with the red plastic package inclusive of its contents in his right hand. There was also no cross-examination of PW7 that the accused was holding the car keys to the blue Honda Civic. Neither was there any challenge of PW7 that the accused had opened the boot of the blue Honda Civic and took out the red plastic package inclusive of its contents and held it in his right hand. There was also no cross-examination that there were other packages containing the dangerous drugs found in the boot of the blue Honda Civic which formed the basis of the second original charge of trafficking (see *Re Pichi Muthu* [1970] 2 MLJ 143; and *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC)).

[40] At the close of the prosecution's case, the prosecution succeeded in establishing the following factual matrix:

(a) that the accused had a set of keys which was used to open the boot of the blue Honda Civic;

(b) that the blue Honda Civic was parked at the car park of Flat 'C';

(c) that the blue Honda Civic was a stolen car;

(d) that before the accused approached the blue Honda Civic he was seen by PW7 and L/Kpl Appasamy behaving suspiciously as per the first conduct;

(e) that the accused had used one of the car keys to open the boot of the blue Honda Civic and took out the red plastic package inclusive of its contents and held it in his right hand and was seen walking away from the blue Honda Civic;

(f) when PW7 and L/Kpl Appasamy rushed towards the accused and PW7 introduced himself as *police*, the accused attempted to run away with the red plastic package (inclusive of its contents) in his right hand but was apprehended and he behaved as per the second conduct and as per the third conduct; and

(g) that when the accused opened the boot of the blue Honda Civic, four other packages containing the subject matter of the original second charge were found.

[41] Those were the facts and the circumstances of the case as adduced by the prosecution. We merely reproduce them without any addition or subtraction. Our approach is in accord with the decision of this court in *Basil bin Omar v Public Prosecutor* [2003] 1 MLJ 192. Each of the conduct of the accused when taken separately may appear neutral but when taken together they gave rise to the inference that the accused was aware of the contents of the red plastic package that he was carrying in his right hand as well as the drugs that were found in the boot of the blue Honda Civic. We must not forget that when PW7 and his colleague went to the car park of Flat 'C', it was entirely based on the information pertaining to the theft of a stolen motor vehicle. No information was received in regard to a drug related offence. Both PW7 and his colleague must have least expected to arrest the accused for being in physical possession of the drugs. We are entitled to take into account the damning conduct of the accused before he was arrested. We take heed of what the late Lim Beng Choon J said in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, particularly at pp 589–590 of the report:

> From the proposition as set out in the *Chan Pean Leon* case [1956] MLJ 237, 239 and the *Ong Ah Chuan* case [1981] 1 MLJ 64, it is clear that in considering whether an accused person has sufficiently rebutted the presumption of possession of the dangerous drugs which were found to be in his actual physical custody or under his control (as happened in the instant case), it is legitimate for the court to scrutinise the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act. Such evidence is of course not conclusive by itself; it may be overborne by stronger evidence the other way. Nevertheless, it is not wrong to say that the accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question. Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.

[42] When the defence of the accused was called on both the original charges, the accused elected to give his evidence at the dock. His defence was, briefly, as follows. That on the day in question he was visiting his mother (DW1) at Flat Sri Manjoi, off Klang Lama. After he had his bath, he went out of the flat to smoke a cigarette. It was when he was outside the flat that he was arrested by one Samy. The accused denied any knowledge of the packages, the blue Honda Civic and the car keys.

[43] In his statement, the accused continued to say that when he was brought to the police van, his brother was also inside the police van.

[44] DW1, the accused's mother, in her evidence admitted the accused went out of the flat while she was making a drink for him and that the accused was arrested outside the flat. She testified that the accused was taken to the police station in a van.

[45] DW2, the accused's sister, testified that she was notified by her mother (DW1) that the accused was arrested and she said that she saw the accused was handcuffed in a vehicle. It was a motorcar. She did not mention about seeing her other brother in the same motorcar.

[46] The High Court judge, at the close of the defence, concluded that the defence of the accused was one of mere denial. The High Court judge also found that the evidence of DW1 and DW2 to be irrelevant as they were in the flat at the time of the arrest of the accused and they did not know anything that transpired between the accused and the two police officers at the time of the arrest of the accused. Furthermore, the High Court judge also said that both DW1 and DW2 did not know anything about the blue Honda Civic, or the car keys, or the bag and packages that were seized by PW7.

[47] After hearing the defence, the High Court judge expressed his dissatisfaction with the evidence of the government chemist and amended the charge to one single charge of possession under s 12(2) of the Act punishable under s 39A(1)(d) of the Act notwithstanding the fact that the evidence of the government chemist was not challenged at all, in material particulars, in cross-examination except in so far as to ask the government chemist about the need to comply with s 37(j) of the Act to which the government chemist did not agree and notwithstanding the fact that the High Court judge had found that the defence was one of mere denial.

[48] Indeed the defence was clearly one of mere denial. And having called the defence of the accused on both the original charges of trafficking in the dangerous drugs, the High Court judge should have convicted the accused on both the original charges.

[49] Taylor J in *Leow Nghee Lim v Reg* [1956] MLJ 28 discussed the meaning of the word *possession*. And at p 30, His Lordship had this to say:

> Probably the most helpful definition of possession is:
>
> > The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.
>
> This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[50] Continuing at p 31 of the report, Taylor J had this to say in *Leow Nghee Lim*:

> The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

[51] The available evidence gave rise to a strong inference that the accused was in possession with knowledge of the contents of the red plastic package that was held by him in his right hand as well as the contents in the boot of the blue Honda Civic. There was no evidence to suggest otherwise. The defence of mere denial did not help nor assist the accused in any way whatsoever. The car keys to the blue Honda Civic were held by the accused. All the known facts support the inferences that the drugs were under the control of the accused to the exclusion of other persons. The accused certainly had knowledge of those drugs.

[52] We are aware of the Federal Court decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 which held that it was wrong to use the presumption under s 37(d) of the Act in order to invoke the statutory presumption of trafficking under s 37(da) of the Act. Here, the High Court judge did not make a mistake of resorting to a double presumption. The High Court judge correctly held that the accused was prima facie in possession of the drugs quite independent of s 37(d) of the Act.

[53] On knowledge, I need to refer to the case of *Surentheran a/l Selvaraja v Public Prosecutor* [2006] 1 MLJ 641; [2005] 2 CLJ 264 (CA). There Abdul Aziz Mohamad JCA (later FCJ) aptly said at p 646 (MLJ); p 269 (CLJ) of the report:

> There is, if at all, very seldom available direct proof of the knowledge that is necessary to constitute possession. In almost every case, proof of knowledge has to be by way of inference from the proven circumstances. One set of circumstances differs from another. In any given case, whether knowledge is inferable depends on the particular circumstances of the case and a proper appreciation of them. We have to look at the particular circumstances of this case and assess them independently, without being influenced by what may have been decided in some other case under a different set of circumstances.

[54] And knowledge can certainly be inferred against the accused by looking at the factual matrix of the case.

[55] The evidence of conduct on the part of the accused in attempting to run away from the scene when PW7 identified himself as *police* even before the discovery of the drugs in the red plastic package and the drugs in the boot

of the blue Honda Civic clearly shows prior knowledge of the drugs (*Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, Privy Council).

[56] The case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 (SC). was referred to us. That was a case where the appellant and wife were jointly charged with the offence of trafficking in dangerous drugs to wit, 592.6g of cannabis which was found in a wooden box in the house where at that time was occupied by the appellant, his wife, their children and another man. Acting on a tip-off alleging that there was drug trafficking in the house, the police proceeded to raid the house which was still under construction. At the conclusion of the trial, the appellant was convicted and sentenced to death. The appellant's wife was acquitted and discharged. The appellant appealed. In allowing the appeal, the Supreme Court held that the conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery indicating a sense of guilt. On the other hand, it was also conduct equally consistent with the appellant being in a state of panic. According to the Supreme Court, an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It was for these reasons that the Supreme Court ruled that the inference favourable to the accused should be drawn.

[57] In the present appeal before us, there is no other evidence for this court to make an inference other than the inference that the accused was aware of the drugs in the red plastic package and had knowledge of the same.

[58] And since the evidence also shows that the accused was in possession of the car keys to the blue Honda Civic, which evidence was unchallenged, the accused can be said to be in custody or control of the blue Honda Civic. Consequently, the inference would be that the accused was in possession with knowledge of the drugs in the boot of the blue Honda Civic.

[59] There was a finding of possession of the drugs by the High Court judge before the presumption of trafficking was invoked (see the judgment of Abdul Malek Ahmad PCA in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 (FC) particularly at p 708 at para 43) and that finding was correctly made and must be affirmed by this court.

[60] I will now refer to the Singapore's Court of Appeal case of *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49 and the facts of that case may be stated as follows. The second appellant was seen alighting from a car carrying a plastic bag. When confronted by the narcotic officer, the second appellant looked stunned and dropped the plastic bag. Wee Chong Jin CJ (Singapore) had this to say in regard to possession (see p 52 of the report):

Indeed, even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

[61] Not to be outwitted, the learned counsel for the accused submitted that the drugs were wrapped in newspapers and could not be seen and therefore no inference of knowledge could be drawn. The answer to that can be seen in the Federal Court case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1. There at p 9, Arifin Zakaria FCJ delivering the judgment of the Federal Court had this to say:

Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:

[21] For the element of 'posession' (within the meaning of s 17 of the Misuse of Drugs Act 1973) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1978–1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.

[22] We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply be ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case

to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):

> In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[62] The crucial question to pose would be this. Whether an inference other than an inference of knowledge which show the guilty mind of the accused can be drawn from the facts of this appeal? The High Court judge concluded that the prosecution had proven actual possession without having to rely on s 37(d) of the Act. Admittedly, the High Court judge had not dealt with the evidence extensively in his grounds of judgment. But what is apparent is that there was an express affirmative finding of possession of the drugs. Even if it can be argued that there was no such affirmative finding of possession of the drugs, which was not the case here, this court is entitled to and has reviewed the available evidence and has made the affirmative finding of possession of the drugs by the accused (*Basil bin Omar*). It is part and parcel of our judgment that the prosecution had succeeded in proving the element of mens rea possession (*Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 which was cited with approval by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457). That being the case, the High Court judge was right when he applied the presumption of trafficking at the prima facie stage under s 37(da)(iiia) of the Act — where the minimum triggering weight would be 15g.

[63] Since the defence was one of mere denial, the accused did not successfully rebut the presumption of trafficking on the balance of probabilities (*Ng Chai Kem v Public Prosecutor* [1994] 2 MLJ 210 which applied *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). No explanation was offered by the accused to rebut the presumption of trafficking. The accused should be convicted of trafficking in the dangerous drugs for both the original charges.

CONCLUSION

[64] Upon a careful consideration of the appeal records and the respective submissions, we are of the unanimous view that the High Court judge had erred in arriving at the whole of the decision.

[65] We therefore allow the respective appeals of the prosecution and the accused. The whole of the decision of the High Court judge is hereby set

aside and we substitute it with a conviction under s 39B(1)(a) of the Act and punishable under s 39B(2) of the Act in respect of both the original charges. We therefore impose the mandatory death sentence under each of the original charges.

[66] My learned brother, Low Hop Bing JCA and my learned sister Heliliah Yusof JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

High Court decision set aside. Conviction under s 39B(1)(a) of the Act on each charge substituted and accused sentenced to death.

Reported by Andrew Christopher Simon